Supreme Court, U. S.
FILED
SEP 4 - 1980
MICHAEL RODAK, JR., CLE

NO. 80-351

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRANK R. MAGNELLI,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
STATE CIVIL SERVICE COMMISSION

and

PENNSYLVANIA LIQUOR CONTROL BOARD

ON WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT
OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Frank R. Magnelli, pro se
Counsel of Record
221 South 31st Street
Harrisburg, PA 17109
Telephone (717) 545-1378
(717) 787-8271

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE DECISION BELOW DIRECTLY CONFLICTS WITH THE FREEDOM OF SPEECH PRINCIPLES ENUNICIATED IN THE COURT'S PICKERING V. BOARD OF EDUCATION RULING?

II

WHETHER THE EXERCISE OF AN ENFORCEMENT OFFICER'S DUTY TO DISCLOSE WRONGDOING ON THE PART OF A PUBLIC OFFICIAL IS A PROTECTED RIGHT UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES SHIELDING HIM FROM RETALIATION BY THE PUBLIC OFFICIAL?

III

WHETHER THE PENNSYLVANIA STATE CIVIL SERVICE COMMISSION VIOLATED THE PROCEDURAL DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY DENYING PETITIONER A FAIR AND IMPARTIAL HEARING AND AN ADJUDICATION MADE IN ACCORDANCE WITH LAW?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Reference to Reports and Opinions	2
Jurisdiction	3
Constitutional Provisions Involved	3
Statement of the Case	4
Argument	12
Conclusion	25
Appendix A (Order of Dismissal)	26
Appendix B (Adjudication of Pennsylvania State Civil Service Commission)	34
Appendix C (Opinion and Order of Commonwealth Court of Pennsylvania)	41
Appendix D (Order of the Supreme Court of Pennsylvania)	52

TABLE OF AUTHORITIES

Page

CASES

Givhan v. Western Line Consolidated School District, 439 U.S. 410 14

Interstate Commerce Commission v. Louisville and Nashville Railroad Company, 227 U.S. 88 18

Perry v. Sinderman, 408 U.S. 593 16

Pickering v. Board of Education, 391 U.S. 563 12

Speiser v. Randall, 357 U.S. 513 15

CONSTITUTIONAL PROVISIONS

Amendment I 3

Amendment XIV, Section 1 3

PENNSYLVANIA STATUTES

Administrative Agency Law
Act of June 4, 1945, P.L. 1388

71 Purdon's Penna. Statutes Annotated §1710.34 23

71 Purdon's Penna. Statutes Annotated §1710.44 23

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRANK R. MAGNELLI,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
STATE CIVIL SERVICE COMMISSION

and

PENNSYLVANIA LIQUOR CONTROL BOARD

ON WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT
OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, FRANK R. MAGNELLI, prays that a writ of certiorari issue to review the adjudication and order of the Pennsylvania State Civil Service Commission rendered August 24, 1978 and to review the opinion and judgment of the

Commonwealth Court of the Commonwealth of Pennsylvania rendered on December 11, 1979. A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied June 19, 1980 by Order dated June 23, 1980.

REFERENCE TO REPORTS AND OPINIONS

The order of dismissal of the Pennsylvania Liquor Control Board unreported appears at Appendix A, infra, pp.26-33. The adjudication and order of the Pennsylvania State Civil Service Commission unreported appears at Appendix B, infra, pp.34-40. The opinion of the Commonwealth Court of Pennsylvania, as reported in 47 Commonwealth Ct. 597, ___ A.2d ___ (1979) appears at Appendix C, infra, pp.41-51. The order of the Supreme Court of Pennsylvania, is unreported and appears at Appendix D, infra p. 52.

JURISDICTION

The order of the Supreme Court of Pennsylvania denying Petitioner's Petition for Allowance of Appeal was entered on June 19, 1980 by order dated June 23, 1980. See Appendix D, infra, p.52. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> ". . . or abridging the freedom of speech . . ."

Constitution of the United States, Amendment XIV, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

Petitioner was employed by the Pennsylvania Liquor Control Board as an Enforcement Officer, a state civil service position, for over 18 years. His record was unblemished and he received continuous excellent ratings.

Petitioner is an attorney at law and had maintained a non-profit part time law practice with the full knowledge of the Liquor Board.

On August 24, 1977 Petitioner was called into his Supervisor's office, told of a meeting held that same day by the members of the Pennsylvania Liquor Control Board where charges against him were considered and that he was dismissed. The dismissal was without warning or suspension and he was ordered to leave the office immediately, although the dismissal was not to be effective until August 29, 1977.

Several months prior to this a series of facts developed within the Liquor Board which led Petitioner to believe that the Chairman of the Liquor Board was engaged in illegal activities with respect to a license application.

These facts are summarized as follows: Daniel Bingham, a Liquor Board Enforcement Officer, was assigned to investigate the transfer of a liquor license. During the course of this investigation he discovered that the owners of record were not, in fact, the owners. The liquor license had been sold on consecutive occasions to other parties without the knowledge or the required approval of the Liquor Board.

The transfer that was attempted to be accomplished with Liquor Board approval was from the owners of record, who had no interest whatever in the license, to the applicant.

Officer Bingham reported these find-

ings to the Liquor Board. He recommended that a citation be issued and stated that we can definitely prove the violation (Pet.Ex.A15;R-128,251-253). His recommendation was approved by the District Supervisor and a Notice of Violation, the initial step in the license revocation procedure, was sent to the licensees of record (Pet.Ex.A17;R.128,255).

Subsequent to these events and prior to the approval of the transfer of the license by the entire Liquor Board, the Chairman of the Board, acting independently, permitted all the intervening parties having an interest in the liquor license to submit releases. This was done to remove any legal objections to the transfer of the license (Pet.Ex.A19, A20;R.128,258,259).

On the basis of these facts, Petitioner wrote a letter to the Attorney General of Pennsylvania requesting an

investigation of the Chairman's conduct (Res.Ex.AA17;R.56,57,194-200). The letter was entirely factual, contained no false statements and was made in a confidential manner.

The Pennsylvania Department of Justice initiated an investigation. The investigation was personally conducted by the Director of the Bureau of Investigations. He interviewed several persons, including the Chairman of the Liquor Board, who he was investigating.

Nothing developed from the Justice Department investigation and on July 28, 1977 a letter was sent by the Attorney General of Pennsylvania to the Board Chairman instead of to Petitioner who had requested the investigation. The letter concluded that no violations of law had occurred and named Petitioner as the Board Chairman's accuser (Res.Ex. AA18,R.59,60,201,202).

The letter stated, in part, that:

> "Investigation by the Bureau of Investigations determined that the license had not in fact been transferred when Mr. Magnelli had thought it had been and was not transferred until there was a full Board approval."

The unlawful conduct on the part of the Board Chairman that Petitioner questioned was the Chairman's unilateral action in removing the impediments to the transfer of the liquor license. He never questioned the later approval of the transfer by the full Board (Res.Ex. AA17,R.57,198,199).

The determination that no violation of law had occurred was made despite the Justice Department's investigating Director's testimony before the Civil Service Commission that: "I was convinced that the investigation by Officer Bingham established a violation" (R.71). He also testified: "I did not want to destroy the confidence of Frank Magnelli

in requesting me to do this investigation" (R.62) and that it was his intent at all times to maintain confidentiality (R.68). This same Director drafted ninety-nine percent of the letter that was signed by the Attorney General and sent to the Chairman of the Liquor Board naming Petitioner as his accuser (R.58).

Immediately thereafter the Liquor Board launched a retaliatory investigation against Petitioner. This investigation disclosed that Petitioner had misused sick leave on five occasions in five years and had a "hobby" law practice which Petitioner established never generated net income (Pet.Ex.A27,A28;143-146,266-287) and the existence of which was known by the Board.

Petitioner was dismissed for gross misconduct as an employe of the Board by means of: Insubordination; Misconduct amounting to violations of law, rules or lawful departmental orders and scandalous

or disgraceful conduct while on or off duty which may bring the service of the Commonwealth into disrepute. Petitioner's letter to the Attorney General was specifically cited in the dismissal order as the basis for Petitioner's termination as well as sick leave abuse and the outside practice of law "for gain". The letter was also entered into the record at the Civil Service Commission hearing as evidence against Petitioner (Res.Ex.AA17; R.56,57,194-200).

The State Civil Service Commission sustained the dismissal based upon the sick leave and law practice allegations and in doing so made unfounded findings of fact and improper conclusions of law. It omitted any reference to Petitioner's letter although the question of the letter was presented at the Commission hearing and was argued by Petitioner in his brief to the Commission.

The Commonwealth Court on appeal sustained the Civil Service Commission's conclusions. The court in its opinion recognized that Petitioner's letter triggered an investigation "highly unusual in nature", but disregarded Petitioner's argument that his free speech rights were violated. Petitioner had argued that the "real reason" for dismissing him was an angry reaction to his letter to the Attorney General and not the "given reason" the sick leave and law practice reasons.

Commonwealth Court reasoned that since the State Civil Service Commission did not list the letter as a ground for discharge it was not obligated to consider the free speech question involved. Commonwealth Court gave no consideration to either this question or to the question of Petitioner's denial of procedural due process. Both questions were raised

by Petitioner in his Petition for Review and in his arguments directed to that court.

A Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied on June 19, 1980.

ARGUMENT

I

WHETHER THE DECISION BELOW DIRECTLY CONFLICTS WITH THE FREEDOM OF SPEECH PRINCIPLES ENUNCIATED IN THE COURT'S PICKERING V. BOARD OF EDUCATION RULING?

In Pickering v. Board of Education, 391 U.S. 563, this Court held that a statement by a public employee as to matters of public concern even though critical or directed against his superiors is entitled to First Amendment protection. The illegal conduct of the Chairman of the Pennsylvania Liquor

control Board was a matter of public concern and Petitioner's letter was an expression of a protected right.

The Court in its Pickering ruling also established the principle that the exercise of free speech cannot act as a cause for termination of the employment relationship unless there is some demonstrated or minimally evident effect on the continuation of that relationship.

Petitioner's action could have had no effect on his employment relationship, and none was evident. The writing of a letter, that should have remained confidential, by a state enforcement officer to the chief enforcement officer of his state regarding the illegal conduct of a public official was the proper exercise of a protected right.

The fact that Petitioner expressed his views in a confidential manner does not forfeit his protection against

governmental abridgment of his freedom of speech. Givhan v. Western Line Consolidated School District, 439 U.S. 410.

II

WHETHER THE EXERCISE OF AN ENFORCEMENT OFFICER'S DUTY TO DISCLOSE WRONGDOING ON THE PART OF A PUBLIC OFFICIAL IS A PROTECTED RIGHT UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES SHIELDING HIM FROM RETALIATION BY THE PUBLIC OFFICIAL?

The Pennsylvania Liquor Control Board dismissed Petitioner for exercising his right of speech guaranteed by the First Amendment of the Constitution of the United States without a showing of a compelling State interest justifying its actions.

"For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly' Speiser v. Randall, 357 U.S. 513,526. Such interference with constitutional

rights is impermissible . . . most often, we have applied the principle to denials of public employment." Perry v. Sinderman, 408 U.S.593,597.

Petitioner had a right to public employment as a civil service employee. This right could not be extinguished because of the exercise of a constitutionally protected privilege or for cause predicated upon a retaliatory investigation motivated by revenge.

The "given reasons" for Petitioner's dismissal - minor sick leave violations and non profit law practice were not the "real reasons". The real reason was the exercise of a constitutionally protected right.

If a law enforcement officer must hesitate in reporting to a proper authority wrongdoing on the part of a public official for fear that he will be subjected to retaliation by the public

official and that a long overlooked or undiscovered infraction of a regulation would be searched out and magnified out of proportion to punish him, the chilling effect on law enforcement would be disastrous.

III

WHETHER THE PENNSYLVANIA STATE CIVIL SERVICE COMMISSION VIOLATED THE PROCEDURAL DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY DENYING PETITIONER A FAIR AND IMPARTIAL HEARING AND AN ADJUDICATION MADE IN ACCORDANCE WITH LAW?

Administrative orders, quasi-judicial in character are void if a hearing is denied; if the hearing granted is manifestly unfair; if the finding is indis-

putably contrary to the evidence; or if the facts found do not as a matter of law, support the order made. Interstate Commerce Commission v. Louisville and Nashville Railroad Company, 227 U.S. 88, 91.

The Pennsylvania State Civil Service Commission made findings of fact that were contrary to the evidence, exaggerated the already overstated charges against Petitioner and added allegations of wrongdoing that were nonexistent. The hearing it provided was manifestly unfair and its adjudication was not in accordance with law.

The Pennsylvania State Civil Service Commission's adjudication, Appendix B, infra pp.34-40, contains unfounded findings of fact and determinations such as "The appellant had little or no respect for his superior officers, the chairman and members of the Pennsylvania Liquor

Control Board." This is completely false and there is no evidence to support such a finding of fact.

The determination that: "Gradually appellant became obsessed with antagonism for his employer the Pennsylvania Liquor Control Board. The demeanor became quite antagonistic to the Chairman of the Pennsylvania Liquor Control Board" is completely without foundation. It is impossible to infer from the record or otherwise the existence of any antagonism on the part of Petitioner towards his employer the Pennsylvania Liquor Control Board or the Chairman of the Pennsylvania Liquor Control Board. The questioning of the Chairman was short (R.165-167) and consisted only of a few questions which were limited primarily to his knowledge of Petitioner maintaining a law office.

At the Civil Service Hearing the

Commission found the "ancient" dates in the charges against Petitioner "very irrelevent and immaterial" and refused to accept them (R.p.27) but included them in its adjudication. The charge of "Insubordination" was also rejected at the hearing (R.p.106) then revived in the Commission's Findings of Fact.

The groundless and improper determination that Petitioner's law practice was a "conflict of interest" was also made by the Commission. (Appendix B, infra p.38) An employee of the Pennsylvania Liquor Control Board engaged in any conduct involving a conflict of interest would be in violation of the Pennsylvania Liquor Code. Such a violation was not even considered by the Pennsylvania Liquor Control Board as a basis for dismissal.

The Commission overlooked the freedom of speech issue and did not question the

Pennsylvania Liquor Control Board's retaliatory action. No consideration was given the vindictive attitude of the Liquor Control Board evidenced by Petitioner's summary dismissal and immediate expulsion from his office although the termination was not to be effective until five days later.

The Commission concluded that "the removal of appellant was proper and just, especially because of the high level position held by appellant and the fact that as a lawyer, his conduct should have been exemplary to others in the same classification."

The position of Enforcement Officer III, an assistant supervisor in a District Office, most certainly is not a high level position in the structure of the Pennsylvania Liquor Control Board and the fact that Petitioner is a lawyer should not have placed a higher burden

of conduct on him than on any other individual in the same civil service classification.

To reason and conclude that the removal of a State Civil Service employee with an unblemished record of over 18 years was "proper and just" especially because he was an assistant supervisor and a lawyer is illogical and definitely not proper and just. The State Civil Service Commission's conclusions must be based on the facts on the face of the record not on arbitrary and senseless reasoning.

Petitioner was entitled to a fair hearing and an adjudication made in accordance with law. This he was not given. The unfounded findings of fact and unreasonable conclusions obligated the court below to scrutinize the hearing procedure and the record to determine whether Petitioner's constitutional rights were violated and whether the State Civil

Service Commission's adjudication was in accordance with law. It did neither.

Section 34 of the Administrative Agency Law of Pennsylvania requires:

> "All adjudications shall be in writing, shall contain findings and the reasons for the adjudication . . ." (Emphasis Added) Administrative Agency Law, Act of June 4, 1945, P.L. 1388, 71 Purdon's Penna. Statutes Annotated 1710.34.

Here the Commission gave no reasons in its adjudication as to how it arrived at its findings of fact or how it reached its conclusions. Failing to do so, Commonwealth Court under Section 44 of the Administrative Agency Law was required to set aside, modify or remand the adjudication.

Section 44 of Pennsylvania's Administrative Agency Law is as follows:

> "The court to which the appeal is taken shall hear the appeal without a jury on the record certified by the agency. After hearing, the court shall affirm the adjudication, unless it shall find that the same is in violation

> of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of sections thirty-one to thirty-five inclusive of this act have been violated in the proceeding before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may set aside or modify it, in whole or in part, or may remand the proceeding to the agency for further disposition in accordance with the order of the court." (Emphasis Added) Administrative Agency Law, Act of June 4, 1945, P.L. 1388, 71 Purdon's Penna. Statues Annotated 1710.44.

The Civil Service Commission in ignoring the freedom of speech issue and not disclosing in its adjudication how it moved from its findings of fact to its broad conclusions without demonstrating the logic of these conclusions on the face of the record failed to perform its full duty.

Commonwealth Court disregarded the violation of Petitioner's constitutional rights, overlooked the requirements of

Sections 34 and 44 of the Administrative Agency Law of Pennsylvania and allowed an adjudication that was not in accordance with law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the adjudication of the Pennsylvania State Civil Service Commission and the judgment and opinion of the Commonwealth Court of Pennsylvania.

Respectfully submitted,

Frank A. Magnelli

Frank R. Magnelli, pro se
Counsel of Record
221 South 31st Street
Harrisburg, Pennsylvania 17109
Telephone (717) 545-1378
(717) 787-8271

APPENDIX A

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA LIQUOR CONTROL BOARD
Harrisburg, Pennsylvania 17124
August 25, 1977

CERTIFIED -RETURN RECEIPT REQUESTED

Mr. Frank R. Magnelli
221 South 31st Street
Harrisburg, PA 17109

Dear Mr. Magnelli:

At a meeting of the Pennsylvania Liquor Control Board held Wednesday, August 24, 1977, consideration was given to certain charges which were presented against you, to wit:

Gross misconduct as an employe of the Board by means of:

1) Insubordination.

2) Misconduct amounting to violation of law, rules or lawful departmental orders.

3) Scandalous or disgraceful conduct while on or off duty which may bring the service of the Commonwealth into disrepute.

More particularly, you violated the following provisions of the Handbook

for Enforcement Officers, adopted by the Board and the Bureau of Enforcement and made known to you.

1) a. The Handbook, page A-4 provides:

> "All Officers are employed on a full-time basis and are subject to duty at all hours of the day and night, seven days a week. Therefore, any other business, occupation, or employment of a gainful nature is prohibited, even if on a part-time basis."

The Handbook, page A-8, lists examples of behavior constituting grounds for disciplinary action, including dismissal. Number 13 on said list states,

> "Engagements in any other business, occupation or employment for gain."

You have, since at least October of 1973, and continuing until the present time, actively engaged in the gainful practice of Law.

b. The Handbook, page A-8 also lists as an example of

said grounds for disciplinary action Number 2, which states,

Insubordination or failure to obey an official, lawful order of a superior officer."

By the said practice of Law, you were insubordinate of this provision in that you violated the prohibition against such activity as adopted by the Board and the Bureau of Enforcement.

c. The Handbook, page A-8, also lists as an example of grounds for disciplinary action Number 22, which states,

"Falsification oral or written, or reports, records, or communications by commission, omission, deception or fraud, alone or in collusion with others."

You took Sick Leave on at least the following dates for the purpose of engaging in the practice of Law; May 8, 1973; June 5, 1974; July 9, 1974; February 20, 1976; and March 7, 1977.

2) a. The Handbook, page A-9

also lists as an example of said grounds for disciplinary action Number 21, which states,

"Personal conduct, while on or off duty which may tend to bring the service of the Bureau, Board or Commonwealth into disrepute."

By letter dated April 20, 1977, addressed to Robert P. Kane, Attorney General of the Commonwealth of Pennsylvania, you requested an investigation of the conduct of Henry H. Kaplan, Chairman of the Board. The letter addressed itself to a particular case handled by the Board. It specifically accused Chairman Kaplan of a breach of his official duty and a violation of the Pennsylvania Crimes Code.

The letter contained numerous misrepresentations of fact, misleading statements, and omissions of material facts. These inaccuracies were clearly made in bad faith and with a malicious intent, since all the errors

made were of such a nature that by nature of the position occupied by you, you either knew they were false or misleading or knew that you were not in possession of sufficient information to justify the allegations made.

By letter dated July 28, 1977, from Attorney General Kane to Chairman Kaplan, the Chairman was advised that an investigation of your allegations was conducted by the Bureau of Investigations, Department of Justice and that the facts were reviewed by the Office of Criminal Law of the Department of Justice. The letter advised the Chairman that no evidence of wrong-doing had been found.

b. The Handbook, page A-9, also lists as an example of said grounds for disciplinary action Number 26, which states,

> "Any adverse criticism of Bureau or Board policy, Hearing Examiners, Deputies, Attorneys, other Enforcement Officers, supervisory personnel, local authorities, other agencies or officials or the Code except in writing to the Office of the Director, through channels."

Your letter to the Attorney General completely bypassed all channels within the Pennsylvania Liquor Control Board.

It was the decision of the Board that:

> You be removed from your Enforcement Officer III position, effective close of business, Monday, August 29, 1977.

This personnel action may be appealed by either of the following methods:

1) Appeal in writing to the Civil Service Commission (your rights are explained in the attached Extracts from the Civil Service Act).

2) File a grievance in accordance with the negotiated grievance procedure in the collective bargaining agreement, within 12 days of receipt

of this letter. You may present a grievance with the assistance of the union representative, regardless of your union membership status. It is also your right to present such a grievance without the intervention of the union.

Since you have more than ten (10) years creditable service with the Commonwealth, you may:

1) Withdraw your retirement contributions in lump sum, in which case you should complete the five items checked in red on the Form OA-410, "Application for Return of Contributions", and return it to this office for processing.

2) Apply for an annuity. In this event, please complete the front side of the enclosed Application for Retirement Allowance (RS-6), indicating which option you select.

3) Vest your contribution. You may elect to leave your accumulated deductions in the fund until you reach superannuation age (age 60) and then apply for a retirement allowance. The advantage of vesting is that it eliminates any reduction in your annuity

because of age. Should you decide to vest, complete the attached Application for Vesting (RS-6-V, Pink).

If you have any questions concerning your retirement options, please contact James E. Hanawalt, Employe Services Division, Room 425 Northwest Office Building, Harrisburg, Pennsylvania, 17124, 787-5972.

/s/ Edgar D. Free
Edgar D. Free
Personnel Director

Attachments

RKR/mw

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA

FRANK R. MAGNELLI	:	State Civil Service
v.	:	Commission
Pennsylvania Liquor Control Board	:	Appeal No. 2304

Walter K. Swartzkopf, Jr., Esquire Attorney for Appellant	Kenneth W. Makowski, Esquire Assistant Attorney General Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Frank R. Magnelli from his removal as Enforcement Officer 3, regular status, by the Pennsylvania Liquor Control Board. The hearing was before Commissioners Ethel S. Barnett, Mary D. Barnes, and Chairman John A. M. McCarthy, who presided.

FINDINGS OF FACT

1. Appellant was removed on the charges of misconduct as an employe of the Pennsylvania

Liquor Control Board by means of: insubordination; misconduct, amounting to violation of law, rules, and lawful departmental orders; scandalous or disrespectful conduct while on or off duty, which may bring the service of Commonwealth into disrepute.

2. Appellant was removed, effective at the close of business August 29, 1977, by letter dated August 25, 1977.

3. Appellant within the statutory time appealed his removal by letter to the State Civil Service Commission.

4. Appellant by answer to Preliminary Inquiry Relating to Appeal and Request for Hearing stated his appeal was under Sections 951(a) and 951(b) of the Civil Service Act, as the reasons given by the appointing authority were violations of the provisions of the Civil Service Act, and it was a discriminatory dismissal, based upon nonmerit factors.

5. A hearing was scheduled for November 17, 1977, and was continued.

6. A hearing was held December 14, 1977, at 1:30 p.m., Eastern Standard Time, in the South Office Building, Harrisburg, Pennsylvania, of which all parties in interest had proper notice.

7. Appellant was a Civil Service employe in the classification of Enforcement Officer 3, regular status.

8. Appellant appeared personally, testified in his own behalf, and presented testimony of one (1) witness.

9. The appointing authority presented testimony of eight (8) witnesses.

10. The appointing authority did not discriminate against appellant or use nonmerit factors in the removal of appellant.

11. The Handbook for the Enforcement Officers requires full time service and prohibits other gainful business or employment, full time or part time.

12. Appellant acted as Master in Divorce for which he was compensated for a minimum of 11 cases between October 1973 and early 1977.

13. Appellant rented office space for the practice of law in the law offices of Morrison and Atkins.

14. As a lawyer, appellant had a name list in the Pennsylvania Legal Directory and in the yellow pages of the Harrisburg telephone book.

15. Appellant paid a fee and re-

ceived an identification card from the Disciplinary Board of Pennsylvania as an active lawyer.

16. The Handbook for Enforcement Officers prohibits falsification of records or reports by commission, omission, deception or fraud, either alone or with others.

17. Appellant took sick leave when he actually practiced law on May 3, 1973, July 5, 1974, July 9, 1974, February 20, 1976 and March 7, 1977.

18. When appellant acted as Master in Divorce he was paid and on some of those occasions he was paid by the appointing authority for sick leave.

19. The appellant was insubordinate in not following the rules and regulations of the appointing authority.

20. The appellant had little or no respect for his superior officers, the chairman and members of the Pennsylvania Liquor Control Board.

21. The evidence of the appointing authority is the credible evidence in this case.

The appellant was an Attorney-at-Law, admitted to practice in the Supreme Court of Pennsylvania. He was a member of the Dauphin County Bar. Appellant had risen

to the high rank of Enforcement Officer 3 with regular status.

Gradually appellant became obsessed with antagonism for his employer, the Pennsylvania Liquor Control Board. The demeanor became quite antagonistic to the Chairman of the Pennsylvania Liquor Control Board.

The appellant, as a lawyer, knew the conditions of his employment. The appellant was bound by the rules and regulations of the appointing authority, yet he deliberately and intentionally broke the rules. Appellant misused sick leave. The appellant actively engaged in the practice of law. The appellant attempted to justify such activity, which was also a conflict of interest, by saying that he was learning criminal law and preparing himself for retirement. This was contrary to the requirement that he engage in no other business,

occupation or employment.

We have reviewed the Notes of Testimony, exhibits, and read the briefs. We conclude the removal of appellant was proper and just, especially because of the high level position held by appellant and the fact that as a lawyer, his conduct should have been exemplary to others in the same classification. Therefore, we enter as

CONCLUSIONS OF LAW

1. Appellant was properly removed under Section 807 of the Civil Service Act, as amended.

2. The appointing authority did not violate Section 905.1 of the Civil Service Act, as amended, by discriminating against appellant.

ORDER

AND NOW, August 24, 1978, the State Civil Service Commission by unanimous agreement of its three members, dismisses the appeal of Frank R. Magnelli from his removal as Enforcement Officer

3, regular status, and sustains the action of the Pennsylvania Liquor Control Board in the removal of Frank R. Magnelli from his position as Enforcement Officer 3, regular status, effective at the close of business Monday, August 29, 1977.

State Civil Service Commission

/s/ John A. M. McCarthy
John A. M. McCarthy
Chairman

APPENDIX C

IN THE COMMONWEALTH COURT

OF

PENNSYLVANIA

FRANK R. MAGNELLI, :

Petitioner :

v. NO. 2101 C.D. 1978

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA LIQUOR CONTROL BOARD, :

Respondent :

BEFORE: HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE DAVID W. CRAIG, Judge

(Panel)

ARGUED: September 14, 1979

O P I N I O N

Opinion of Judge Crumlish, Jr.

Filed: December 11, 1979

Frank R. Magnelli appeals from an adjudication and order of the State Civil Service Commission affirming his dismissal from the Pennsylvania Liquor Control Board (Board) where he had been employed as an Enforcement Officer III.

The reasons given by the Board for Magnelli's dismissal are set forth in his letter of discharge:

> "Gross misconduct as employee of the Board by means of:
>
> "(1) Insubordination.
>
> "(2) Misconduct amounting to violation of law, rules or lawful departmental orders.
>
> "(3) Scandalous or disgraceful conduct while on or off duty which may bring the service of the Commonwealth into disrepute."

The letter detailed three provisions of the Handbook for Enforcement Officers

which Magnelli had allegedly violated: (1) engaging in the gainful practice of law while employed by the Board[1]; (2) utilizing his sick leave on five separate occasions to engage in the practice of law[2]; and (3) bringing malicious, unsubstantiated charges in bad faith against the Chairman of the Board accusing him of a breach of his official duty and a violation of the Pennsylvania Crimes Code.[3]

Magnelli, although admitting he abused his sick leave privilege for the purpose of practicing law, contends that the real reason for his dismissal had nothing at all to do with practicing law or abusing sick leave, but rather a personal vendetta of the Board against him resulting from a letter he wrote to the Justice Department alleging that the Chairman of the Board failed to properly execute his duties in con-

nection with the approval of a liquor license. Thus, he contends that his discharge was discriminatory and was based solely on non-merit factors, an impermissible basis for discharge under Section 905.1 of the Civil Service Act[4]. In view of the excellent work record which he maintained over an 18-year period while in the employ of the Board, Magnelli contends that the punishment given him by the Board was too harsh and a more appropriate penalty would have been the issuance of a warning, or at most a suspension.

On an appeal from an adjudication by the State Civil Service Commission, our scope of review is limited to a determination of whether or not the constitutional rights of the appellant have been violated, an error of law has been committed, or a necessary

finding of fact was unsupported by substantial evidence. Hence, it is our duty to examine the record for the purpose of determining whether or not the Commission exercised reasonable discretion in rendering its decision and we will not weigh the evidence and substitute our judgment for that of the Commission. Philadelphia County Board Assistance v. Cahan, 24 Pa. Commonwealth Ct. 543, 358 A.2d 440 (1976).

While the thrust of Magnelli's argument is that he was discharged in retaliation for writing what he believed to be a confidential letter to the Attorney General questioning the propriety of a high-level superior's conduct in a particular matter, this is not one of the grounds for discharge listed in the Commission's adjudication. The subsequent investigation which his letter triggered, although highly unusual in

nature, is not now before this Court and our inquiry is focused upon those charges which the Commission expressly found to constitute "just cause" for dismissal[5] in its affirmance of Magnelli's dismissal, to wit: (1) that he engaged in gainful employment aside from his position with the Board, which is expressly prohibited in the Handbook for Enforcement Officers; and (2) had used his sick leave to engage in the proscribed outside employment. The narrow issue confronting us is thus whether the record supports the Commission's adjudication that Magnelli was properly removed from his position with the Board for the aforementioned reasons.

The fundamental controlling premise underlying employment with the classified service is, as the Civil

Service Act instructs, that the merit concept prevails. Speaking to this concept in civil service employment, Judge Mencer wrote for this Court in Department of Transportation v. Desikachar, 22 Pa. Commonwealth Ct. 507, 508-09, 349 A.2d 796, 797 (1976), that the "concept requires 'personnel actions' of the Commonwealth to be based upon merit criteria relevant to the proper execution of the employee's duties. The criteria must be job-related and in some logical and rational manner touch upon competency and ability."

Our examination of the record leads us to but one conclusion, viz: that the Commission properly exercised its functions in the administrative framework and must be affirmed. Clearly, the grounds for removal proffered by the Commission and admitted by Magnelli

are sufficient to constitute "just cause" under Section 807 of the Act. Undoubtedly, the Commission's findings that Magnelli engaged in the outside practice of employment and abused his sick leave privilege to do so are job-related and definitely touch upon his competency and ability. As such, they represent serious misconduct sufficent to support the Commission's order.

Accordingly, we

O R D E R

AND NOW, this 11th day of December, 1979, the order of the State Civil Service Commission dated August 24, 1978, dismissing the appeal of Frank R. Magnelli from his removal as Enforcement Officer III is hereby affirmed.

/s/ James C. Crumlish Jr.
James C. Crumlish, Jr., Judge

FOOTNOTES

[1]In violation of instructions contained at Page A-4 of the Handbook which provides:

> "All officers are employed on a full time basis and are subject to duty at all hours of the day and night, seven days a week. Therefore any other business, occupation or employment of a gainful nature is prohibited, even if on a part time basis."

Also, Page A-9 of the Handbook lists the following example of behavior constituting grounds for disciplinary action:

> "13. Engagement in any other business occupation or employment for gain."

[2]In violation of the Handbook rules at Page A-9 which list as grounds for disciplinary action, the following prohibited conduct:

> "21. Personal conduct, while on or off duty, which may tend to bring the services of the Bureau, Board or Commonwealth into disrepute.
>
> "22. Falsification, oral or written, of reports, records or communications by commission, ommission, deception or fraud alone or in collusion with others."

[3]In violation of Handbook rules found at Page A-9 which contains the following example of grounds for disciplinary action:

"26. Any adverse criticism of Bureau or Board policies, hearing examiners, deputies, attorneys, other enforcement officers, supervisory personnel, local authorities, other agencies or officials or the Courts except in writing to the office of the Director, through channels."

[4]Act of August 5, 1941, P.L. 752, as amended, added by the Act of August 27, 1973, 71 P.S. §741.905a.

[5]Section 807 of the Civil Service Act provides that "(n)o regular employe in the classified service shall be removed except for just cause." 71 P.S. §741.807.

IN THE COMMONWEALTH COURT

OF

PENNSYLVANIA

FRANK R. MAGNELLI, :

Petitioner :

v. : NO. 2101 C.D. 1978

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA LIQUOR CONTROL BOARD, :

Respondent :

O R D E R

AND NOW, this 11th day of December, 1979, the order of the State Civil Service Commission dated August 24, 1978, dismissing the appeal of Frank R. Magnelli from his removal as Enforcement Officer III is hereby affirmed.

/s/ James C. Crumlish, Jr.
James C. Crumlish, Jr., Judge

APPENDIX D

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

Sally Mrvos
Prothonotary
Mildred E. Williamson
Deputy Prothonotary

P.O. Box 624
Harrisburg 17108

June 23, 1980

Walter K. Swartzkopf, Jr., Esquire
407 North Front Street
Harrisburg, Pa. 17101

Re: Magnelli, Petitioner v.
Com. of Pa., Pa. Liquor
Control Board, et al
No. 3M.D. Misc. DK., 1980

Dear Mr. Swartzkopf:

This is to advise you that on June 19, 1980, the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

/s/ Mildred E. Williamson
Deputy Prothonotary

MEW/sb
cc: Kenneth W. Makowski, Esquire
Barbara G. Raup, Esquire

Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

NO. 80-351

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRANK R. MAGNELLI,
PETITIONER

V.

COMMONWEALTH OF PENNSYLVANIA
STATE CIVIL SERVICE COMMISSION

AND

PENNSYLVANIA LIQUOR CONTROL BOARD
RESPONDENTS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Patrick M. McHugh
Assistant Attorney General
Barbara G. Raup
Assistant Attorney General

ATTORNEYS FOR RESPONDENTS

407 Northwest Office Building
Harrisburg, Pennsylvania 17124
TELEPHONE: (717) 787-4664

TABLE OF CONTENTS

	Page
I. History of the Case	1
II. Reasons for Denying Writ. . . .	2
A. The record is sufficient to sustain the findings of the Civil Service Commission . .	3
B. The decision which Petitioner seeks to have reviewed was based on adequate and independent State grounds. . . .	8
C. The Petitioner's actions did not amount to an exercise of free speech within the principle enunciated in Pickering v. Board of Education. . . .	9
D. The Petition does not present a Federal question of significance.	15
E. The Petitioner's procedural due process rights were not violated by the Pennsylvania Civil Service Commission . .	16
III. The State Civil Service Commission is improperly named as a party to these proceedings. . .	17
IV. Conclusion.	21

TABLE OF CITATIONS

CASES:	Page
Anderson National Bank v. Luckett, 321 U.S. 233, 246	16
Berea College v. Kentucky, 211 U.S. 45, 54	9
Fox Film Corp. v. Muller, 296 U.S. 207.	9
Gregory v. McVeigh, 90 U.S. 294	19
Murdock v. Memphis, 20 Wall. 590, 636	9
Pickering v. Board of Education, 391 U.S. 563.	2,9, 10
Virginian Railway Co. v. Mullens, 271 U.S. 220.	19
Worchester County Trust Co. v. Riley, 302 U.S. 292.	17
STATUTORY PROVISIONS:	
2 Pa. C.S.A. Chapter 7, Sub-Chapter A	17
42 Pa. C.S.A. §763	17
42 Pa. C.S.A. §1513.	19
Pa. Judicial Code, Act of July 9, 1976, P.L. 586, No. 142 §2, 42 P.S. §723.	18
42 P.S. §724.	18
28 U.S.C. §1257(3)	.17,18

I. HISTORY OF THE CASE

On August 29, 1977, Frank R. Magnelli (herein referred to as Petitioner) was discharged for gross misconduct as an employee. The details of his misconduct were conveyed to Petitioner at the time of his discharge. Petitioner appealed the discharge to the Pennsylvania State Civil Service Commission which, on August 24, 1978, after a full hearing, found that sufficient evidence was presented by the Board to justify Petitioner's discharge. Petitioner appealed the Adjudication to the Commonwealth Court of Pennsylvania which, in a decision rendered December 11, 1979, found that the record supported the Commission's finding. Petitioner filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was denied by Order dated June 23, 1980. On September 4, 1980,

Petitioner filed the present Petition for Writ of Certiorari to this Court.

II. REASONS FOR DENYING WRIT

The decision which is the subject of this Petition does not warrant consideration by this Court for several reasons. First, the decision is manifestly correct. Second, the decision is based on non-Federal grounds which adequately support the State's judgment. Third, the Petitioner's actions, in accusing the Chairman of the Pennsylvania Liquor Control Board of criminal activity, were false and reckless and not within the ambit of Pickering v. Board of Education, 391 U.S. 563. Fourth, the Petition does not present a Federal question of significance or substance. Fifth, the Petitioner's procedural due process rights were not violated by the Pennsylvania State Civil Service Commission.

A. THE RECORD IS SUFFICIENT TO SUSTAIN THE FINDINGS OF THE CIVIL SERVICE COMMISSION.

The material facts of this case are not in dispute. The reasons for Petitioner's removal are clearly set forth in Item "A" of the Index of Items identified in the Record at 12. It was not contested that on July 23, 1959, Petitioner executed his oath of office and swore to "obey the orders of the Pennsylvania Liquor Control Board and the officers appointed over me, according to the rules and regulations officially adopted." (Appointing Authority Exhibit No. 21, R.87). The form of the oath has not been changed (R.87). The Pennsylvania Liquor Control Board promulgated its current Handbook for Enforcement Officers on May 1, 1971. The Forward of the Handbook provides that its provisions "shall remain in effect until amended or rescinded." The Forward is signed by the three members of the Board

and the Director of the Bureau of Enforcement in office at that time. (Appointing Authority Exhibit No. 12). It was not contested that on February 14, 1972, Petitioner executed a certification that he had been issued the current Handbook for Enforcement Officers and that he read it and fully understood its contents. (Appointing Authority Exhibit No. 20). The Handbook, page A-4, provides:

> "All officers are employed on a full-time basis and are subject to duty at all hours of the day and night, seven days a week. Therefore, any other business, occupation or employment of a gainful nature is prohibited, even on a part-time basis."
> (Emphasis added)

Admittedly, Petitioner served as a Master in Divorce cases on at least eleven (11) occasions and handled an unspecified number of arbitrations for which he was paid. (Appointing Authority Exhibits Nos. 1 through 11; R. 141 - 157). The Handbook, beginning on page A-8, lists examples of

behavior constituting grounds for disciplinary action up to and including dismissal. Number 13 on said list states:

> "Engagement in any other business, occupation or employment for gain."

It was not contested that Petitioner was listed as a practicing attorney with an office in the Pennsylvania Legal Directory and the Yellow Pages of the Harrisburg Telephone Book. (Appointing Authority Exhibits Nos. 13 and 14). It was also admitted that he paid the required fee and was registered with and was issued a card by the Court Administrator of Pennsylvania as an active as opposed to inactive member of the bar of Pennsylvania (R. 160). In short, since at least October of 1973, and continuing into 1977, the records show beyond any conceivable doubt that Petitioner was actively engaged in the practice of law and was paid for it. Whether or not he made a profit is immaterial. The in-

tolerable conflict between his activities is obvious, of course. As a lawyer, a sworn officer of the Court, he undertook obligations to perform certain tasks at certain specified times and those obligations determined the legal rights of litigants, the very heart of a lawyer's professional and ethical duty. At the same time, he was obligated by the Handbook which set forth his conditions of employment as an enforcement officer, a supervisor in fact. He was sworn to follow the rules promulgated by the Handbook which required him to be available seven (7) days a week. He deliberately placed himself in an impossible position between two sworn duties constantly open to collision and compromise.

The Handbook, beginning on page A-8, also lists as an example of grounds for disciplinary action No. 22, which states:

> "Falsification, oral or written, of reports, records or communications by commission, omission, deception or fraud, alone or in collusion with others."

Admittedly, Petitioner took sick leave on at least the following dates for the purpose of engaging in the practice of law: May 8, 1973; June 5, 1974; July 9, 1974; February 20, 1976 and March 7, 1977. (Appointing Authority Exhibits Nos. 16, 24, 25 and R. 161). Without contradiction, Ronald Rowe, Director of Labor Relations for the Appointing Authority, testified that he had handled disciplinary actions since 1970 (R. 174), and he further stated that:

> "The discipline practice of the Board on abuse of sick leave, falsification of sick leave, has generally been that the Board views that as tantamount to theft, a fraudulent misrepresentation of a reason to get paid sick leave when you're not truly sick and are out doing something else. And generally the Board has reacted with discharge."

Rowe further testified without contradiction that in cases of willful misrepresentation or falsification, the Appointing Authority has discharged employees on the first such offense (R. 175). He testified without contradiction that the Appointing Authority has reacted with discharge in every such case of which he was aware (R. 175).

B. THE DECISION WHICH PETITIONER SEEKS TO HAVE REVIEWED WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Furthermore, examination of the Petition for Review filed by Petitioner before the Commonwealth Court reveals that the constitutional challenges now asserted were not placed before that Court. The decision of the Commonwealth Court was also based upon grounds established under State law. Therefore, as the decision below was based upon adequate non-Federal grounds, i.e., a finding of substantial

evidence in support of the fact-finder's finding of "just cause" for removal, there exists no substantial Federal question for revi w by this Court. See Murdock v. Memphis, 20 Wall. 590, 636; Berea College v. Kentucky, 211 U.S. 45, 54; Fox Film Corp. v. Muller, 296 U.S. 207.

C. THE PETITIONER'S ACTIONS DID NOT AMOUNT TO AN EXERCISE OF FREE SPEECH WITHIN THE PRINCIPLE ENUNCIATED IN PICKERING V. BOARD OF EDUCATION.

Petitioner contends that the decisions below conflict with the freedom of speech principle enunciated in Pickering v. Board of Education. There is an important factual difference between that case and the present matter. Pickering was dismissed solely for writing a letter to a newspaper which criticized the position of his employers

with respect to school finances. Petitioners's discharge was upheld on the grounds that he engaged in a prohibited other business and misused sick time to do so. Furthermore, this Court, in Pickering, noted that false statements knowingly or recklessly made were not within the ambit of the First Amendment-Free Speech Clause. A review of the record below would indicate that Petitioner's accusations against the Chairman of the Board were false statements knowingly or recklessly made.

A cause of Petitioner's removal was that he violated another provision of the Handbook. Among the grounds listed for disciplinary action on page A-9 is Number 21, which states:

> "Personal conduct while on or off duty, which may tend to bring the service of the Bureau, Board or Commonwealth into disrepute."

Another cause was that he violated page A-9, Number 26, which states:

> "Any adverse criticism of Bureau or Board policy, Hearing Examiners, Deputies, Attorneys, other Enforcement Officers, supervisory personnel, local authorities, other agencies or officials or the Code except in writing to the Office of the Director through channels."

Both of the above provisions were violated when Petition wrote to the Attorney General of the Commonwealth accusing the Chairman of the Pennsylvania Liquor Control Board of a crime in connection with the approval of a liquor license. He caused an investigation of the Chairman by the Justice Department which completely exonerated the Chairman. (Appointing Authority Exhibits Nos. 17 and 18). The entire matter was based upon a recommendation which emanated from Enforcement District 3. The recommendation was reversed at a higher level by two superiors with the concurrence of the Board Chief Counsel

(Appointing Authority Exhibit No. 19, R. 255), and Petitioner made no effort to determine whether or not his superiors at the central office rejected the recommendation. In fact, the recommendation was rejected and the citation issue never reached the Members of the Pennsylvania Liquor Control Board. (R. 76 - 79). Apparently unknown to Petitioner, contracts to transfer licenses can be specifically enforced by the courts subject to approval of the transfer by the Liquor Control Board. Also, contrary to his allegations, the full Board did approve the transfer in the exercise of their discretion under the law. (Appointing Authority Exhibit No. 22, R. 89-91). His allegations were irresponsible in that he was not in a position to know the facts upon which to accuse Chairman Kaplan of a crime. Whether or not such conduct was sufficient to constitute "just cause" for

discharge, it was certainly sufficient to justify a finding by the Civil Service Commission that Petitioner was antagonistic to his employer and its Chairman in particular. Moreover, he admitted to the Justice Department Investigator that he did not go through channels as required. (R. 63). Additionally, Petitioner admitted bypassing required channels at the hearing. (R. 151 - 153).

The Commission made a finding of fact that Petitioner had little or no respect for his superiors, the Chairman or Members of the Pennsylvania Liquor Control Board (F.F. 19, 20). It is not unusual, nor should it be unexpected that an agency would conduct a full-scale investigation of an employee whose conduct was so antagonistic, reckless and irresponsible as to bring dishonor to his superiors. Moreover, it cannot be reasonably argued

that serious, deliberate violations of the rules and regulations of the Appointing Authority which would otherwise constitute "just cause grounds for dismissal" cannot be considered in a disciplinary hearing merely because these violations were uncovered as a result of an investigation. In fact, there is nothing in the record, albeit the opinion of the Petitioner, which would show a causal relationship between the investigation of Petitioner and retaliative motives.

The gravamen of Petitioner's Petition is that the "real reason" for his discharge was retaliation for his exercise of his free speech rights. As demonstrated above, this issue was raised on the record. "Pretext" is a factual determination. It was an argument rejected by the finder of fact.

D. THE PETITION DOES NOT PRESENT A FEDERAL QUESTION OF SIGNIFICANCE.

The Pennsylvania Supreme Court has previsouly declined to hear a discretionary appeal of this matter, applying a procedural rule expressly modelled on United States Supreme Court Rule 19 and employing similar considerations.[1] The issue in this case relates solely to whether there existed a just-cause basis for Petitioner's discharge. This determination was made by the Pennsylvania State Civil Service Commission and affirmed by the Commonwealth Court of Pennsylvania.

---

[1]Rule 1114, Pa. R. App. P., provides that an appeal is "not a matter of right but of sound judicial discretion and an appeal will be allowed only when there are special important reasons therefor".

E. THE PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE PENNSYLVANIA CIVIL SERVICE COMMISSION.

The Petitioner's assertion of a violation of the procedural due process requirements to the Fourteenth Amendment to the Constitution of the United States, is without merit.

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved the demands of due process are fulfilled."
> Anderson National Bank v. Luckett, 321 U.S. 233, 246.

At the State level, Petitioner was afforded full notice and hearing before the Pennsylvania State Civil Service Commission on his removal from employment with the Respondent, Pennsylvania Liquor Control Board. Judicial review of the

Commission's determination and proceedings was afforded Petitioner in compliance with 2 Pa. C.S.A. Chapter 7, Sub-Chapter A, by the Commonwealth Court of Pennsylvania under its appellate jurisdiction as established by Section 763 of the Judicial Code of Pennsylvania. 42 Pa. C.S.A. §763. Thus, Petitioner had all the process that was due. The mere fact that Petitioner was unsuccessful below does not establish that there has been a violation of due process. Worchester County Trust Co. v. Riley, 302 U.S. 292.

III. THE STATE CIVIL SERVICE COMMISSION IS IMPROPERLY NAMED AS A PARTY TO THESE PROCEEDINGS.

Petitioner cites 28 U.S.C. §1257(3) as the jurisdictional basis for his Petition for Writ of Certiorari. That provision states in pertinent part, that:

> "Final judgments on decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:...
>
> "(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

The Supreme Court of Pennsylvania is the highest Court of the State. Its jurisdiction, over matters such as that here under consideration, is discretionary as established by the Pennsylvania Judicial Code. Act of July 9, 1976, P.L. 586, No. 142 §2, 42 P.S. §§723, 724. In this case, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal there entered by Petitioner. Where the highest Court of the State has discretionary authority to accept or refuse to hear an appeal from a lower Court and refuses to do so, the decision to be reviewed

by this Court is that rendered by the next lower Court. Virginian Railway Co. v. Mullens, 271 U.S. 220; Gregory v. McVeigh, 90 U.S. 294. In this case, the next lower Court rendering a decision was the Commonwealth Court of Pennsylvania.

Rule 19.6 of the Rules of the Supreme Court of the United States states, in pertinent part, that:

> "All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court . . ."

Although the Pennsylvania State Civil Service Commission was named as a Respondent in the Petition for Review filed before the Commonwealth Court of Pennsylvania, that Court, acting under Rule 1513 of the Pennsylvania Rules of Appellate Procedure, deleted the Commission as a party. Pa.R.A.P. §1513, 42 Pa. C.S.A.; Appendix A, Order dated Spetember 6, 1978. As the Commission

was, therefore, not a party to "the proceeding in the Court whose judgment is sought to be reviewed," it is apparent that the Commission has been improperly named as a party to these proceedings.

IV. CONCLUSION

WHEREFORE, based on the foregoing, the Respondents respectfully request this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

PATRICK M. McHUGH
Assistant Attorney General

JAMES J. FITZGERALD, III
Chief Counsel
Pennsylvania Liquor
Control Board

BARBARA G. RAUP
Assistant Attorney General
Pennsylvania State Civil
Service Commission

HARVEY BARTLE, III
Attorney General

ATTORNEY FOR RESPONDENTS

407 Northwest Office Bldg.
Harrisburg, PA 17124
717--787-4664

CERTIFICATE OF SERVICE

I hereby certify that on this day of October, 1980, three copies of the Brief of Respondents in Opposition to Petition for Writ of Certiorari, were mailed, postage pre-paid, to Frank R. Magnelli, pro se, Counsel of Record, 221 South 31st Street, Harrisburg, Pennsylvania 17109. I further certify that all parties required to be served have been served.

Patrick M. McHugh
Assistant Attorney Gener
Pennsylvania Liquor
Control Board
407 Northwest Office Bldg.
Harrisburg, PA 17124
Counsel for Respondents

Supreme Court, U. S.
FILED
OCT 25 1980
MICHAEL RODAK, JR., CLERK

NO. 80-351

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRANK R. MAGNELLI,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
STATE CIVIL SERVICE COMMISSION

and

PENNSYLVANIA LIQUOR CONTROL BOARD

ON WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT
OF THE COMMONWEALTH OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONER

Frank R. Magnelli, pro se
Counsel of Record
221 South 31st Street
Harrisburg, PA 17109
Telephone (717) 545-1378
(717) 787-8271

TABLE OF CONTENTS

		Page
I.	Petitioner's Reply to Respondents' Brief in Opposition	1
	A. The record does not sustain the findings of the Civil Service Commission	1
	B. The decision which Petitioner seeks to have reviewed was not based on adequate and independent state grounds	3
	C. Petitioner's actions involve an exercise of free speech within the principles enunciated in Pickering v. Board of Education	5
	D. Petitioner's Writ presents federal questions of significance	6
II.	Conclusion	8

TABLE OF AUTHORITIES

CASES

	Page
Board of Regents v. Roth 408 U.S. 564	4
Green Bay & Mississippe Canal Co. v. Patten Paper Co. 172 U.S. 58	5
Pickering v. Board of Education 391 U.S. 513	5
St. Joseph Stock Yards Co. v. United States 298 U.S. 38	2
Ward v. Love County 253 U.S. 17	4

I

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

A. THE RECORD DOES NOT SUSTAIN THE FINDINGS OF THE CIVIL SERVICE COMMISSION.

Respondents emphasize the importance of a handbook having no legal significance and overlook the facts to justify the dismissal of Petitioner. Petitioner was not dismissed for violating any handbook provisions. He was dismissed because he exercised his First Amendment right of free speech in reporting wrong doing on the part of the Chairman of the Pennsylvania Liquor Control Board.

There was no intolerable conflict between his enforcement officer duties and his part time law practice. Petitioner maintained excellent performance evaluations. His last performance

evaluation (Pet.Ex.A26,R.139,140) states:

> "You continue to do an excellent job. You performed your duties as Acting Supervisor in an excellent manner. You are an asset to the Board."

Petitioner's part time law practice was well known throughout the Liquor Board. The Chairman, himself was aware of it (R.166). The part time law practice only became objectionable when the Liquor Board sought a basis to dismiss Petitioner. At the Civil Service hearing, the Civil Service Commissioner was even compelled to say (R.32):

> "Why didn't you take action in 1973 if it was such a bad practice?"

Many findings of fact made by the Civil Service Commission were clearly unfounded. The following portion of the Court's opinion in St. Joseph Stock Yards Co. v. United States 298 U.S. 38, 52 merits consideration:

> "Legislative agencies, with varying qualifications, work in a field particularly exposed to political demands. Some may be expert and

> impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies is not one to be lightly regarded."

B. THE DECISION WHICH PETITIONER SEEKS TO HAVE REVIEWED WAS NOT BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Reasons formulated as a result of a retaliatory investigation initiated against one because he exercised a constitutionally protected right cannot constitute adequate and independent state grounds nor may a state court avoid deciding federal questions and thus defeat the jurisdiction of the

United States Supreme Court by putting forward non-federal grounds of decision which are without any fair or substantial support. Ward v. Love County, 253 U.S. 17.

The important question requiring the Court's consideration is not whether there existed an adequate ground for dismissing Petitioner, but whether the stated ground was the real one. This important question was recognized in Board of Regents v. Roth, 408 U.S. 564, 582 (Douglas, J., dissenting):

> "When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. A statutory analogy is present under the National Labor Relations Act, 29 U.S.C. §151 et seq. While discharges of employees for "cause" are permissible (Fibreboard Corp. v. NLRB, 379 U.S. 203, 217), discharges because of an employee's union activities are banned by §8 (a) (3), 29 U.S.C. §158 (a) (3), So the search is to ascertain whether the stated ground was the

real one or only a pretext. See J. P. Stevens & Co. v. NLRB, 380 F. 2d 292, 300." (Emphasis Added)

The constitutional questions involved were placed before Commonwealth Court as revealed by the record. No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted and it is sufficient if it appears from the record that such right was specifically set up or claimed in the state court in such a manner as to bring it to the attention of that court. Green Bay & Mississippi Canal Co. v. Patten Paper Co., 172 U.S. 58.

C. PETITIONER'S ACTIONS INVOLVE AN EXERCISE OF FREE SPEECH WITHIN THE PRINCIPLES ENUNCIATED IN PICKERING V. BOARD OF EDUCATION.

The principle enunciated in Pickering is that a statement by a public employee

as to matters of public concern, even though critical or directed against his superiors is entitled to First Amendment protection. The factual differences between Pickering and Petitioner's case favor Petitioner.

A review of the record would conclusively show that Petitioner made no false or reckless statements. Petitioner made a confidential disclosure to the chief enforcement officer of his state detailing improper conduct on the part of a state official and requested an investigation to verify his conclusions. Such a disclosure is a protected right within the meaning of Pickering. It could not have been made through channels as Respondents claim was Petitioner's duty.

D. PETITIONER'S WRIT PRESENTS FEDERAL QUESTIONS OF SIGNIFICANCE

Petitioner was denied due process and

a right to speak freely on matters of public importance - both are significant questions which are worthy of the Court's consideration. Embodied in the Petition is the denial of another right, the right to the security and assurance that one's confidential communications remain confidential and privileged.

The sanctity of a confidential communication should not be permitted to be violated in order to stifle an enforcement officer's duty to report wrong doing to a proper authority.

II

CONCLUSION

For the reasons stated above, as well as those stated in the Petition for Certiorari, Petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

Frank R. Magnelli

Frank R. Magnelli, pro se
Counsel of Record
221 South 31st Street
Harrisburg, Pennsylvania 17109
Telephone (717) 545-1378
(717) 787-8271